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Issue Brief: Department of Justice Guidance on Law Enforcement Profiling
History and Current State of Play

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Early in his presidency, President George W. Bush vowed to end racial profiling in the United States. At the time, the passage of the End Racial Profiling Act (ERPA) with bi-partisan Congressional support seemed within grasp. The tragic events of 9/11 dramatically shifted this environment and changed law enforcement practices at the local, state and federal levels. Arab, Middle Eastern, Muslim, Sikh, Hindu and South Asian (AMEMSA) communities have been distinctly and acutely impacted by these practices.

Profiling has been a pervasive problem in the United States for centuries impacting African American, Native, Latino, Asian and other communities of color, as well as LGBTQ individuals. Profiling violates the constitutional guarantee of equal protection under the law, dehumanizes and degrades targeted individuals and results in the growing mistrust between communities of color and the law enforcement agents sworn to protect them.

2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies

In June 2003, under the leadership of Attorney General John Ashcroft, the Department of Justice (DOJ) issued the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, which recognizes profiling as ineffective and wrong.

The 2003 Guidance is an ineffective tool in addressing profiling. Specifically, the 2003 Guidance:

- Defines profiling as the invidious use of race or ethnicity in law enforcement activities.
- Prohibits profiling as follows:
    - In the course of routine or spontaneous law enforcement decisions, race or ethnicity may not be considered to any degree except in specific suspect descriptions.
    - In connection with specific investigations, race or ethnicity may be considered if:
        - There is trustworthy information;
        - The information is relevant to the locality or time frame;
        - The information links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization.
    - In national security threats, air transportation security and border enforcement context race and ethnicity may be used in accordance with Constitutional standards. Cases interpreting the constitution allow the consideration of race or ethnicity as one factor, among others, that may be permissibly considered in law enforcement decisions at the border. Additionally, case law permits pretextual traffic stops.
- Applies only to federal law enforcement agencies; does not apply to state and local law enforcement.
- Does not create a ban on profiling for law enforcement surveillance activities.
- Contains no accountability mechanisms.

Since the issuance of the 2003 guidance, SAALT and ally organizations have pressed DOJ to reform the guidance to correct the inadequacies that condone the unfair targeting of AMEMSA communities, border residents and other communities of color.

2014 Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity

Before President Barack Obama came into office, he committed to banning profiling by federal law enforcement and this commitment was reiterated by Attorney General Eric Holder. In December 2014, DOJ, under Holder's leadership, responded to years of outcry by the civil rights community and communities of color impacted by police profiling and issued a new guidance on profiling to replace the 2003 Guidance. However, the 2014 Guidance failed to tackle several of the inadequacies discussed above.

The 2014 Guidance:

- Expands the definition of profiling to prohibit the improper consideration of gender, national origin, religion, sexual orientation or gender identity – in addition to race and ethnicity.
- Prohibits profiling as follows:
    - In the course of routine or spontaneous law enforcement decisions, race, ethnicity, gender, national origin, religion, sexual orientation or gender identity cannot be considered to any degree except in specific suspect descriptions.
    - In connection with all activities other than routine or spontaneous law enforcement activities, race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity can be considered if:
        - There is trustworthy information;
        - The information is relevant to the locality or time frame;
        - The information links persons possessing the protected characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of immigration law, or an authorized intelligence activity.
        - Law enforcement officers must reasonably believe that the law enforcement, security, or intelligence activity is merited under the totality of the circumstances.
- Applies to federal law enforcement officers, except federal law enforcement officers conducting air transportation or border security activities.
- The guidance does not apply to state and local law enforcement agencies except state and local law enforcement officers participating in federal law enforcement task forces.
- Allows law enforcement officers to consider a protected characteristic in connection with source recruitment (informants).
- Allows law enforcement to engage in mapping based on a protected characteristic.
- Addresses training, data collection and accountability.

Comparison of 2003 Guidance and 2014 Guidance

	2003 Guidance	2014 Guidance
Protected characteristics	Race, Ethnicity	Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, Gender Identity
Framework for defining law enforcement activities	-Traditional law enforcement activities • Routine or spontaneous law enforcement decisions • Activities in connection with a specific investigation -National Security and Border Integrity	-Routine or Spontaneous Activities in Domestic Law Enforcement -All Activities other than Routine or Spontaneous Law Enforcement Activities
Border and national security	Creates loopholes that condone racial and ethnic profiling in border and national security context	Law enforcement at borders and airports, among others, are not covered under prohibitions of this guidance.
Applicable to	All federal law enforcement agents	-Federal law enforcement agents except certain border and air transportation security -State and local law enforcement agents participating in federal task forces
Surveillance	Law enforcement could justify profiling during surveillance activities within national security and border integrity loophole OR Claim surveillance falls outside traditional law enforcement activities	Specifically condones mapping based on protected characteristic, as well as recruitment of informants
Accountability mechanisms	Does not address	Cursorily addressed

Impact on AMEMSA Communities

- Excluding border and air transportation agents from coverage under the 2014 Guidance, in essence, keeps the national security and border loopholes of the 2003 Guidance intact. These exemptions disproportionately impact AMEMSA community members who are entering the U.S.
- Specifically condones ethnic mapping, which in the past has been used to surveil innocent Muslim communities.

- Specifically allows for source recruitment. In the past this has harmed AMEMSA communities and stifled the enjoyment of First Amendment activities when mosques and political organizations were infiltrated. This has also resulted in problematic prosecutions stemming from law enforcement entrapment of individuals.